

1 **Ronald Wilcox, Esq., 176601**
 2 2160 The Alameda, First Floor, Suite F
 3 San Jose, CA 95126
 4 Tel: (408) 296-0400
 5 Fax: (408) 296-0486
 ronaldwilcox@post.harvard.edu

6 **Peter F. Barry, Esq., 0266577 (Minnesota - Admitted Pro Hac Vice)**

7 Barry & Slade, LLC
 8 2021 E. Hennepin Are, #195
 9 Minneapolis, Minnesota 55413
 Telephone: (612) 379-8800
 Facsimile: (612) 379-8810
 pbarry@lawpoint.com

10 **ATTORNEYS FOR PLAINTIFF**

11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN JOSE DIVISION**

14
 15 IRMA SANCHEZ, JORGE SANCHEZ
 16 AND SOPHIA SANCHEZ,

17 Plaintiffs,

18 v.

19 CLIENT SERVICES, INC. AND
 20 KARLA DAVIS,

21 Defendants.

22 **CIV. NO. C06-06280 PVT**

23 **DECLARATION OF**
 24 **PETER F. BARRY IN SUPPORT**
 25 **OF PLAINTIFFS' MOTION TO**
COMPEL AND/OR PRECLUDE

26

1. That I am one of the Plaintiffs' attorneys in the matter above-captioned.
2. That I make this declaration in support of Plaintiffs' motion to compel those discovery items identified in Plaintiffs' Motion to Compel dated July 24, 2007, and for a limited Protective Order as further described in said Motion.

27 **Non-appearance of Party Witnesses on February 28, 2007**

28

3. That the Defendants failed to appear and produce their Fed.R.Civ.P. 30(b)(6)

1 designee for a duly noticed deposition of at their corporate headquarters on
2 February 28, 2007. *See Exhibit 1.*

3 4. That Defendant Karla Davis failed to appear for her duly noticed deposition on
5 February 28, 2007, as well. *See Exhibit 2.*

6 5. That both of these depositions were noticed for February 28, 2007, based upon
7 the explicit agreement of Counsel for the Defendant Steve Scott, Esq.

8 6. The date was arrived at by meeting and conferring by telephone and email with
9 Mr. Scott on and through January 26, 2007. *See Exhibit 3.*

10 7. That during our telephone negotiations for deposition dates with Mr. Scott, we
11 agreed that the depositions of Ms. Karla Davis would take place starting on
12 February 28, 2007 in the morning.

13 8. That we also agreed that the depositions of the other collection employees would
14 take place thereafter, continuing on March 1, with March 2, 2007, left as a
15 possible spillover day, in the event the depositions could not be completed by the
16 end of business on March 1, 2007.

17 9. That the scheduling of these depositions was complicated by the fact that all
18 counsel had busy calendars during this time frame, but that all counsel agreed by
19 consensus to this workable schedule.

20 10. That on February 4, 2007, at approximately 1:40 p.m. my co-counsel, Mr. Ron
21 Wilcox, booked a flight and hotel reservation through Expedia.com which would
22 allow him to get into St. Louis, Missouri the night before the depositions were to
23 begin on February 28, 2007. *See Exhibit 4.*

24 11. That on February 4, 2007, at approximately 2:25 p.m. this Declarant booked a
25 flight and hotel reservation through Expedia.com which would allow me to get
26 into St. Louis, Missouri the night before the depositions were to begin on
27 February 28, 2007. *See Exhibit 5.*

12. That on February 5, 2007, Defendants' counsel, Mr. Stephen Scott
2 acknowledged and confirmed in writing his agreement to hold these depositions
3 commencing February 28, 2007, and on through March 2, 2007. *See Exhibit 6.*

13. That Plaintiffs' counsel also agreed to produce, and did in fact produce, the
5 Plaintiffs for deposition on the agreed upon date of February 9, 2007, and said
6 depositions were completed without controversy.

14. That on February 22, 2007, six days before these depositions were to be taken,
8 Mr. Scott mailed and faxed a letter to co-counsel and the undersigned indicating
9 that he would not be producing Defendant Karla Davis for her deposition until
10 March 2, 2007. *See Exhibit 7.*

15. The letter also unilaterally sought to limit the current and former employees
12 Plaintiffs could depose to the 30(b)(6) designee and the party deponent Ms.
13 Karla Davis and to unilaterally reschedule the 30(b)(6) designee to March 1 or
14 March 2, 2007. *Id.*

16. That this was despite the fact that these depositions were for persons that
17 Defendants had previously identified as persons with knowledge of facts in the
18 case pursuant to Fed.R.Civ.P. 26(a)(1). *See Exhibit 8.*

17. That this was further despite the fact that all parties agreed that the depositions
20 were to begin on the morning of February 28, 2007 with Ms. Karla Davis.

18. That Plaintiff's counsel did not have reasonable notice of this unilateral attempt
22 by Defendants to change these deposition dates because we had made non-
23 refundable hotel reservations and plane flights based upon the February 28, 2007
24 starting date, through Expedia.com.

19. That Plaintiff's counsel twice tried to call Defendants' counsel, Mr. Brian Davis,
26 to inquire about why Defendants felt that they were entitled to unilaterally
27 change these deposition dates, but received no return calls. *See Exhibit 9, page*

1 7, line 14.

2 20. That Plaintiff's counsel met and conferred with Defendants' Counsel Mr. Charles
3 Tillage, Esq. by telephone and letter on February 23, 2007, to make clear our
4 position that the depositions were to go forward as noticed, and in the sequence
5 we had specified by our notices of taking deposition. *See Exhibit 10.*

6 21. That on February 26, 2007, Defendants' Counsel Mr. Brian Davis, Esq. sent a
7 letter to the undersigned regarding this discovery dispute. *See Exhibit 11.*

8 22. That in his letter, Mr. Davis in part asserted that Plaintiffs no longer needed to
9 take the depositions of persons whom it had listed in its Fed.R.Civ.P. 26(a)(1)
10 disclosures and whom had been directly involved in collecting the subject debt
11 from Plaintiffs. Mr. Davis also restated his position that the party Defendants
12 would not be produced on February 28, 2007, and did not offer to reimburse the
13 Plaintiffs' counsel for their travel costs related to the Defendants' attempt to
14 change the deposition schedule at the last-minute. *Id.*

15 23. That in response to Defendants' letter on February 26, 2007, the undersigned
16 counsel sent an urgent letter to Defendants' counsel noting amongst other things,
17 a refusal on the part of Defendants to reimburse Plaintiff's counsel for the travel
18 expenses caused by the last minute, unilateral attempt to change and rearrange
19 deposition dates which were taking place half-way across the country. *See*
20 *Exhibit 12.*

21 24. That moreover, Plaintiffs' counsel advised Defendants that they were not
22 permitted to dictate the sequencing of depositions or to ignore duly noticed
23 depositions absent a protective order. *Id.*

24 25. That Plaintiffs' counsel was stuck in a Catch-22 situation: no show on February
25 28, 2007 and risk Fed.R.Civ.P. 37 sanctions for having noticed party depositions
26 and then not appeared; or, appear on February 28, 2007, and risk that the

1 Defendants would not.

2 26. That Plaintiffs chose to proceed with the previously mutually agreed upon
3 deposition dates, absent a compelling explanation for the unilateral attempt to
4 change these dates combined with the lack of an offer to reimburse Plaintiffs'
5 counsel for the significant costs of last minute travel changes.

6 27. That it was patently unreasonable for the Defendants to agree to deposition
7 dates, and then without justification or explanation, unilaterally change those
8 dates after Plaintiffs' counsel had already made travel arrangements.

9 28. That it has been the undersigned's experience that last minute changes to an
10 Expedia.com travel itinerary usually result in large airline change fees, and non-
11 refundable hotel and rental car charges. *See Exhibit 13.*

12 29. That the burden was upon Defendants to either move for a protective order to
13 prevent the depositions from going forward on February 28, 2007, or appear and
14 give testimony. Defendants unfortunately chose to do neither.

15 30. That on February 28, 2007, Plaintiff's counsel arrived to begin their depositions
16 of the parties at the Client Services, Inc. corporate headquarters at approximately
17 9:00 a.m. with a court reporter.

18 31. That after waiting in the lobby for approximately 20 minutes, the general counsel,
19 Ms. Kerry Simpson, appeared and asked counsel to leave the premises and
20 indicated that no depositions would be taking place that day.

21 32. That counsel left thereafter and returned to Client Services, Inc. corporate
22 headquarters the following day.

23 33. That the non-appearance by Defendant Karla Davis and the 30(b)(6) designee at
24 the noticed date and time was prejudicial to the Plaintiffs in that interfered with
25 Plaintiff's trial strategy, caused us to waste an entire business day waiting to
26 commence these depositions, and forced Plaintiffs counsel to have to return on
27
28

1 another trip to St. Louis, Missouri in order to take these depositions.

2 34. That although Defendants were apparently ready to produce Ms. Karla Davis on
3 Friday, March 2, 2007, we did not have sufficient time to take her deposition or
4 the deposition of the 30(b)(6) witness because we had other employee witness
5 depositions to take.

6 35. That Plaintiffs' counsel herein could have likely completed all of the necessary
7 depositions in this case in one trip, had these depositions started on the agreed
8 upon date on February 28, 2007.

9 36. That when the undersigned offered to stay on and work Saturday, March 4,
10 2007, to get these depositions done, Defendants' counsel refused.

12 37. That the total cost for the extra day in St. Louis, Missouri necessitated by
13 Defendants' non-appearance at their depositions was approximately \$136.10 for
14 hotel costs, \$36.62 for meal costs, and \$3,200.00 as and for attorneys fees
15 representing 8 hours at \$400.00 per hour, for a total cost of \$3,372.72.

16 38. Plaintiffs' counsel repeatedly attempted, and did in fact, meet and confer with
17 Defendants in an effort to head-off this discovery problem, as required by the
18 Local Rules.

19 39. That Defendants' refusal to produce these deposition witnesses as agreed and as
20 duly noticed also caused the undersigned counsel to have to stay for another full
21 day in St. Louis because of flight cancellations due to inclement weather, on
22 Saturday March 3, 2007.

24 40. That this non-appearance by Defendants was personally difficult on the
25 undersigned counsel and my wife because we had a seven-month old baby back
26 at home to care for, and I was stuck in St. Louis two days longer than necessary
27 only to later be forced to return to St. Louis to take the depositions of those who
28 failed to appear.

1 **Refusal to Permit Corporate Designee to Testify on Certain Topics**

2 41. That after rescheduling the party depositions, during the course of deposing Mr.
3 Jerry Peterson, Defendant Client Services, Inc.'s 30(b)(6) designee, on April 11,
4 2007, Defendants' counsel made objections to several topics of inquiry which
5 had previously been noticed for this deposition. *See Exhibit 14.*
6 42. Counsel refused to allow the 30(b)(6) witness to testify about these critical
7 discovery topics, and also failed to produce documents *duces tecum* responsive
8 to these topics. *See Exhibit 15.*

9 ***Contents of Personnel Files***

10 43. That Defendants objected to testimony related to the contents of personnel files
11 with respect to deposition notice topic number 10. *Id.*
12 44. That this information is necessary to determine not only whether any employee
13 has ever been disciplined related to this case, but also as to any other allegation of
14 collection misconduct.
15 45. That this information is not protected by any privilege and is obviously
16 discoverable for numerous reasons, not the least of which it may establish
17 ratification of this conduct by the Defendants' management.
18 46. That these personnel files may also establish if there were prior complaints and or
19 allegations of collection misconduct made against these collectors case.
20 47. Finally, the personnel files would likely yield discoverable information regarding
21 pre-hiring background checks and post-hiring training and disciplinary issues.
22 This information is discoverable and these Defendants should be compelled to
23 produce it.
24 48. That in fact, Defendants did earlier make a written objection to a portion of topic
25 10, but indicated that they would produce any information regarding disciplinary
26 action or complaints about Ms. Karla Davis, but at the time of her actual

1 deposition instead produced nothing. *See Exhibit 7, page 2.*

2 ***Information Regarding Financial Condition***

3 49. That Defendants' also refused to provide information regarding their financial
4 condition with respect to deposition notice topics 31 and 32. *Id.*

5 50. That Counsel for the Defendants objected at this deposition based upon privacy
6 grounds, relevancy grounds, and relevancy. Moreover, counsel for Defendants
7 stated that Mr. Peterson did not have the knowledge base upon which he could
8 testify on the company's financial issues. *See Exhibit 15, pages 10 and 17-18.*

9 51. That this information is discoverable and relevant in that Plaintiffs are entitled to
10 know the financial condition of Defendant Client Services, Inc. in assessing the
11 probability and amount of punitive damages in this case at trial, as well as its
12 ability to pay any potential judgment.

13 ***Factual Basis for Answer and Results of Investigation***

14 52. That with respect to deposition notice topics 9, 11, 12, and 13, Defendants refused
15 to provide corporate witness testimony with respect to the underlying factual
16 basis for their Answer in the lawsuit; the factual basis for the defenses plead; the
17 facts supporting any bona fide error defense they might assert; and, the facts
18 surrounding their investigation into the Complaint. *Id.*

19 53. That Plaintiffs are certainly entitled to know all facts upon which Defendants rely
20 not only for their defenses, but which surround this case that are within their
21 knowledge.

22 54. That in addition, Plaintiffs are entitled to know whether or not Defendants are
23 relying upon any defense of bona fide error.

24 55. That if Defendants are not so relying, they should so stipulate on the record.

25 56. That it is highly prejudicial to the Plaintiffs if Defendants be permitted to refuse to
26 answer questions as to this defense under 15 U.S.C. § 1692k(a)(3), and then later

1 raise it as a defense at trial or upon a summary judgment motion.

2 57. That in fact, Defendant made no objections to topics 11, 12, and 13 in its written
3 objection to a portion of the 30(b)(6) topics on February 22, 2007, but at the time
4 of the actual deposition produced nothing and refused to allow the corporate
5 designee testify on these topics. *See Exhibit 7, page 2.*

6 58. That Defendants' Counsel later provided further written objections and asserted
7 justification for refusing to allow the 30(b)(6) corporate designee to testify on
8 certain topics, almost two months after these depositions had been noticed, and
9 18 days after the depositions had already been taken. *See Exhibit 16.*

10 59. That these objections were made well after the 30-day time frame to either
11 produce discovery or make evidentiary objections, and to the extent that
12 Defendants seek to broaden the basis of their objections, should be stricken as
13 waived and untimely objections.

14 ***Information Regarding Prior Complaints and Lawsuits***

15 60. That Defendants' also refused to provide information regarding prior complaints
16 and lawsuits with respect to deposition notice topic 26. *See Exhibit 15.*

17 61. That this information is essential in helping Plaintiffs to establish possible punitive
18 damages as well as for the Court in determining statutory damages at trial.

19 62. That under the Fair Debt Collection Practices Act ("FDCPA") the Court is to
20 consider, among other relevant factors, "...the frequency and persistence of
21 noncompliance by the debt collector, the nature of such noncompliance, and the
22 extent to which such noncompliance was intentional." *See 15 U.S.C. §*
23 *1692k(a)(3).*

24 63. That the reason given by counsel at the Fed.R.Civ.P. 30(b)(6) deposition was
25 simply that "this witness is not a witness that has that information in his
knowledge base, so he can't testify on that." *See Exhibit 15, page 9, line 24.*

64. That previously, Defendants' counsel had objected by letter to topic 26 on the grounds that it was "vague and ambiguous, burdensome and oppressive, overbroad and not reasonably calculated to lead to the discovery of admissible evidence." *See Exhibit 7, page 2.*

Assertion of Impermissible Privacy Privilege

65. That on April 11, 2007, Defendant Karla Davis's deposition was taken in St. Charles, Missouri.

66. That during Ms. Davis's deposition, her counsel repeatedly and improperly invoked a "privacy" privilege with respect to her involvement in prior legal proceedings, her job performance appraisals, and her personnel matters, generally. *See Exhibit 17, pages 11-15, 19-20, 23, and 26-27.*

67. The parties have already entered into a Stipulated Protective Order. There was no reasonable justification to refuse to answer the deposition questions.

68. That Plaintiffs are entitled to know the contents of Defendant Davis's personnel file because its contents may show similar prior acts of collection misconduct, complaints, training issues, and performance appraisal information.

69. That it is also axiomatic that Plaintiffs are entitled to know about prior sworn statements in other legal proceedings that Ms. Davis has been involved in order to develop impeachment material, trial strategy, and or to properly cross examine this party deponent.

Non-appearance of Third-Party Deponent Don Bailey

70. That Plaintiffs subpoenaed the deposition testimony of a former employee, Mr. Don Bailey, on April 12, 2007, to coincide with the make-up depositions of Defendant Karla Davis and the corporate designee on April 11 and 12, 2007. *See Exhibit 18.*

71. That Defendants' counsel refused to allow this subpoenaed deposition testimony

1 of Mr. Don Bailey to go forward. *See Exhibit 19, pages 3-18.*

2 72. That this testimony was important for a number of reasons in this case. Mr. Bailey
3 could testify to pattern, practice, and policies at Defendant Client Services, Inc.
4 during the relevant periods in this case since he worked there at those times. Mr.
5 Bailey has also been named in earlier lawsuits, also alleging abusive and intrusive
6 collection phone calls, involving Defendant Client Services, Inc. As a former
7 employee, Mr. Bailey would be freer to speak his mind on such topics of collector
8 practices, discipline, training, compensation, and other matters relevant to this
9 case.

10 73. That at no time prior to April 11, 2007, did Defendants' counsel ever advise this
11 declarant that they represented Mr. Bailey in any capacity.

12 74. That on April 12, 2007, at approximately 3:00 p.m. Mr. Bailey arrived at the hotel
13 room where his deposition was to take place and knocked on the door.

14 75. That Counsel for the Defendants then took a break from the deposition that was
15 currently taking place and went out into the hallway to speak with Mr. Bailey.

16 76. That thereafter, Counsel for the Defendants returned to the deposition room some
17 50 or so minutes later and advised the undersigned that Mr. Bailey would not be
18 appearing for his deposition and that he had returned to work.

19 77. That upon information and belief, Defendants' counsel advised Mr. Bailey that he
20 could leave, despite having been properly subpoenaed for this deposition.

21 78. That there was no justification for instructing or advising this witness that he
22 could leave the premises where this and the other depositions were to take place.

23 79. That Defendants' counsel did not file a motion to quash Mr. Bailey's subpoena in
24 the United States District Court for the Eastern District of Missouri, or file a
25 motion for a protective order with the United States District Court for the
26 Northern District of California, as was his right and the procedurally appropriate

thing to do especially given that they have now asserted that they represent him.

80. That instead, Defendants' counsel unilaterally determined that this subpoenaed testimony would not go forward that day and excused his "client" from having to appear that day.

81. That even more troubling in this circumstance was Defendants' counsel's representations on the record with respect to his legal representation of Mr. Bailey.

82. That on April 11, 2007, Defendants' counsel represented to the undersigned that he had been in communication with Mr. Bailey; that he represented him as a lawyer; and, that he was uncertain whether or not Mr. Bailey would appear to testify the following day:

Page 92

3 MR. BARRY: Mr. Davis?

4 MR. DAVIS: Yeah.

5 MR. BARRY: Have you spoken with Don Bailey?

6 We're still on the record.

7 MR. DAVIS: I'm not going to answer any
8 questions on the record.

9 MR. BARRY: Well, I want to know whether or
10 not he's going to appear tomorrow, is my question.

11 MR. DAVIS: You know --

12 MB BARRY: Because if he is --

13 MR. DAVIS: To be honest with you on that, I
14 really don't know. I don't know if he's going to
15 appear tomorrow.

16 MR. BARRY: Do you represent him?

17 MR. DAVIS: Absolutely.

18 MR. BARRY: Okay.

19 MR. DAVIS: And as soon as I can give you an
20 assurance that he's going to appear, I definitely
21 will. We represent him. I just don't feel
22 comfortable making a promise to you at this moment
23 that he will show up tomorrow. I hope he does. If I
24 get confirmation he will, I'll give it to you. At
25 this moment I don't have that yet.

Page 93

1 MR. BARRY: Okay.

2 MR. DAVIS: But as soon as I have it, I'm
3 going to pass it on. It's not a secret.

4 MR. BARRY: But you represent him?

5 MR. DAVIS: Absolutely.

6 MR. BARRY: You've apparently been in
7 communication with him?

8 MR. DAVIS: Absolutely.

9 MR. BARRY: All right. Okay. ...

See Exhibit 18, pages 92-93.

83. That on the next day, April 12, 2007, the following exchange took place between
counsel:

PAGE 5

6 MR. BARRY: And, in fact, Mr. Davis, who is
7 [Mr. Bailey's] counsel?

8 MR. DAVIS: I am his counsel.

9 MR. BARRY: Okay. Now, my understanding,
10 from your comments yesterday, were that you had
11 already been in communication with him and that you
12 were his counsel. Now today, you've just indicated
13 that this is the first opportunity you've ever had to
14 speak with him.

15 MR. DAVIS: Yes, because what -- just to

16 clarify, and apparently you misunderstood me
 17 yesterday. What we had done, as soon as we learned of
 18 the subpoena -- and I didn't learn of it until
 19 Saturday -- I sent an e-mail to Ron, as a matter of
 20 fact -- we have left messages for Mr. Bailey, and it
 21 sounds like we did not have the correct phone numbers
 22 for him, which is why I was not able to get a
 23 telephone call back from him. So I have not had an
 24 opportunity to talk to him, although I had attempted
 25 to contact, and we had left messages for him.

7 Page 6

8
 1 MR. BARRY: Well, given the fact he's a
 2 former employee, I can't -- I can't get my mind around
 3 the notion that you represented him without having
 4 talked to him initially to be represented by him.

11
 5 MR. DAVIS: We -- we represent all current
 6 and former employees of Client Services, Incorporated,
 7 in connection with this litigation. For example,
 8 Karla Davis is a former employee of Client Services,
 9 Incorporated, and frankly, it doesn't make any
 10 difference for purposes of us defending Client
 11 Services and their employees, current and former, in
 12 this matter. And Mr. Bailey, now that he was able to
 13 finally have a direct communication with me,
 14 confirmed, and I can confirm for you on the record,
 15 that I represent him, and I will be defending him in
 16 this deposition in the event he appears for a
 17 deposition.

18
 19 MR. BARRY: Well, I sought to communicate
 20 with Mr. Bailey yesterday, prior to your
 21 representation of him. You told me that you
 22 represented him. Now, on that basis, I couldn't have
 23 communication with him. Now you're telling me today
 24 on the record that you represented him, that you had
 25 your first communication with him in this hotel lobby
 today and spent the time that we noted for his

24 Page 7

25
 1 deposition apparently conversing with him and getting
 2 yourself retained as his attorney, and used up any
 3 available time we would have had to depose him in this
 4 matter, and we could have dispensed with his
 5 deposition, likely dispensed with the deposition in

1 6 the first 50 minutes that he was here. And so the
 2 problem I have is that you indicated -- you indicated
 3 to me yesterday that you represented him, and now
 4 you're indicating that it was just today that you were
 5 retained by him.

6 11 MR. DAVIS: No, that's not what I'm saying.
 7 I wasn't just retained by him today. Again, because
 8 apparently this isn't clear to you, we represent
 9 Client Service -- Client Services, Incorporated and
 10 their current and former employees with respect to
 11 this litigation. The moment that you served a
 12 subpoena on one of our employees or former employees,
 13 then he came within our representation. The fact that
 14 you handled it in a way that neither he nor I were
 15 provided enough advanced notice is what prevented our
 16 ability to have a substantive conversation before the
 17 deposition.

18 12 MR. BARRY: How can you represent a person
 19 without their knowledge or consent, Mr. Davis? I'm
 20 21 unaware of how that's possible.

22 14 Page 8

23 15 MR. DAVIS: Well, I'm sorry you don't
 24 understand how representation works, but there's no
 25 point in me stating it again, other than to again
 1 remind you that we represent Client Services,
 2 Incorporated and all of their current and former
 3 employees in connection with this litigation.

4 19 MR. BARRY: Well, I understand that you've
 5 asserted that, and I understand that you want to
 6 assert that, and I understand that it's in your
 7 client's interest, Client Services, and the named
 8 parties to have that. But my question is, how -- how
 9 is it possible for you to unilaterally state that you
 10 represent the entire universe of employees without
 11 their consent or without even their knowledge?

12 24 MR. DAVIS: I obviously don't need to get
 13 into that, because, one, it's not my job to educate
 14 you on how representation works; and second, anything
 15 with respect to the communications with my clients is
 16 obviously privileged, so I'm not going to get into
 17 that. I'll just add to the record, as well, if it
 18 wasn't already obvious, that we are again objecting to

1 22 unreasonable and ineffective notice for this
 2 23 deposition, which is, frankly, what caused all of
 3 24 these problems, and then the other being that there
 4 25 was no meet and confer effort with respect to

5 Page 9

6 1 scheduling and also the identity of the witness, when
 7 2 you consider that Mr. Bailey had no involvement in the
 8 3 Sanchez account or, for that matter, the Discover Card
 9 4 Services account. Consequently, he possesses no
 10 5 discoverable information or admissible information in
 11 6 this litigation.

12 7 MR. BARRY: And I understand you have
 13 8 objections, but, you know, I'd also note that you've
 14 9 had better than a week to file a motion to quash or a
 15 10 motion for protective order both with respect to
 16 11 Mr. Andrews, who was produced here yesterday, and with
 17 12 respect to Mr. Bailey, who was not produced here
 18 13 today, and you didn't do so, and so the California
 19 14 local rules, as I understand them, in the United
 20 15 States District Court for the Northern District of
 21 16 California, allows us to serve a subpoena on a third
 22 17 party and then attempt to meet and confer. That
 23 18 didn't happen in this case, and you didn't move to
 24 19 quash the subpoena or for a protective order.
 25 20 Moreover, I object to the -- I'm not -- I'm
 26 21 trying not to use incendiary language with you, Mr.
 27 22 Davis, because I do respect you, but I object to the
 28 23 tactic of telling us that you represent Mr. Bailey,
 29 24 when, in fact, you don't represent him. You didn't
 30 25 represent him as of yesterday. He didn't know who you

31 Page 10

32 1 were as of yesterday, and you just apparently
 33 2 contacted him for the first time. He learned of you
 34 3 today, and I have a problem with that.
 35 4 I'd like for you to clarify what your
 36 5 definition of "former employees" is, because what it
 37 6 appears as though you are seeking to -- you are
 38 7 seeking to prevent us, as counsel, from investigating
 39 8 this case by taking -- by taking -- unilaterally
 40 9 stating that you represent an entire universe of
 41 10 people with or without their consent here in Missouri.
 42 11 I don't -- I'm not privy to whether or not you're
 43 12 licensed here in Missouri. I don't think that you

13 are, but if you are, you can correct the record now.
 14 But I don't understand how you can prevent, by just
 15 unilaterally stating you represent every single,
 16 solitary, former employee of Client Services, with or
 17 without their consent, with respect to this
 18 litigation. I don't know how they consented to that.
 19 I don't know if you publish a notice for that or how
 20 that happens.

21 And I know you said you don't seek to
 22 educate me on representation, and I trust that you
 23 don't, because I don't believe that you, yourself,
 24 have a clear understanding of when you can and cannot
 25 represent a particular party.

9 Page 11

10 1 Mr. Bailey appeared today, ready to go
 11 2 forward in this deposition at this hotel, and
 12 3 apparently you took him out in the hallway and talked
 13 4 with him and didn't attempt to meet and confer with us
 14 5 at that time. You did send an e-mail to us previously
 15 6 with respect to meet and confer, and we returned your
 16 7 phone call, or Mr. Wilcox returned your phone call,
 17 8 though we did not get a return call back from you.
 18 9 My question is, to you, do you have a
 19 10 retainer agreement with Mr. Bailey that's been signed,
 20 11 and how are your fees being paid, if any? Are you a
 21 12 pro bono attorney with respect to Mr. Bailey? And how
 22 13 is it that you were able to contract your services
 23 14 with him in the hallway of this hotel?

15 MR. DAVIS: The only thing I'll add is just
 16 to clarify one of your many misstatements, is that
 17 Mr. Bailey, as a result of the way you handled this,
 18 was not prepared to go forward with his deposition
 19 today, and I'll just leave it at that.

22 *See Exhibit 19, pages 5-11.*

23 84. That this third-party deponent testimony was pre-empted and prevented by
 24 Defendants' counsel requiring Plaintiffs' counsel to make yet another
 25 unnecessary and expensive trip to St. Louis, Missouri in order to gather evidence
 26 in their case.

27 85. That Defendants' counsel has improperly sought to declare that his law firm

1 represents all former employees with regard to this case. It goes without saying
2 that a person has a right to choose counsel—and that it cannot be appointed to
3 them without their consent in a matter such as this.

4 86. That moreover, both California and Missouri ethical rules permit counsel to seek
5 out and talk to former employees of a corporate Defendant such as this one, and
6 under circumstances such as these, so long as those employees are not known to
7 be represented by counsel.

8 87. That Defendants' counsel's assertion that he is the de facto legal representative
9 for all current and former employees of Defendant Client Services, Inc. is without
10 legal or factual basis.

12 88. Defendant also refused to properly respond to Requests for Production of
13 Documents relating to personnel files. *See Exhibit 20, Plaintiff's Interrogatories,*
14 *Requests for Admissions, and Request for Production of Documents, Set One,*
15 *Page 11, Number 6. Also see Exhibit 21, Defendant's Client Services, Inc.'s*
16 *and Karla Davis' Objections and Responses to Plaintiffs' First Set of Requests*
17 *for Production of Documents, Page 7, item 6.*

18 89. The parties met and conferred on these matters since February 2007 via
19 telephone, fax, on the record at depositions, via e-mail, and finally in a one-hour
20 telephone conference on July 27, 2007, attended by two counsel for Defendants
21 and two counsel for Plaintiffs. Unfortunately, the matters were not resolved.

23 90. That this declarant respectfully asserts that this Honorable Court should enter a
24 protective order clarifying this fact and thereby preventing Defendants' counsel
25 from making sweeping assertions of representation such as these without a
26 factual basis. Otherwise, Plaintiffs will be prejudiced by being unable to speak to
27 witnesses that may lead to the discovery of admissible evidence.

1 Further Your Declarant Sayeth Naught.

2 Respectfully Submitted,

3 Dated: July 30, 2007

s/Peter F. Barry

4 Declarant

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28